

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES P. GRAHAM,	:	CIVIL ACTION
Plaintiff,	:	NO. 01-2593
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, <u>et al.</u> ,	:	
Defendants	:	

MEMORANDUM

Giles, C.J.

July ____, 2002

I. Introduction

On May 25, 2001, James Graham (“Mr. Graham”) sought compensatory and punitive damages against the City of Philadelphia (“City”), Prison Health Services and named individual employees (“PHS defendants”), as well as against ActionAIDS and named individual employees (“ActionAIDS defendants”), for alleged violations of Title VII, 42 U.S.C. 2000e-2(a)(1)&(2) (Counts I-II), 42 U.S.C. § 1983 (Count III), Title I of the ADA, 42 U.S.C. § 12112(b)(4) (Count IV), and Article I, Section 7 of the Pennsylvania Constitution (Count V) and state law wrongful discharge (Count VI).¹ In response to a motion to dismiss filed by PHS defendants, plaintiff voluntarily withdrew all claims against them and those claims were dismissed without prejudice.

ActionAIDS defendants have moved to dismiss all claims asserted against them. Mr. Graham contested the motion. On May 23, 2002, the court dismissed the Title VII and ADA claims against ActionAIDS defendants with prejudice and ordered a hearing on the remaining

¹ There was some confusion during the briefing of this motion about whether plaintiff had filed an amended complaint or second amended complaint. Only an original complaint, dated May 25, 2001, has been docketed.

claims. The parties were advised in a telephone conference call that the court would hear testimony and take evidence at a hearing on all issues to be decided.

At the hearing held on June 19, 2002, Mr. Graham, through counsel, withdrew all claims against the City. These claims were dismissed with prejudice. Therefore, before the court is the ActionAIDS defendants' motion to dismiss the remaining claims against them which the court treats as a motion for summary judgment. For the reasons that follow, that motion is granted.

II. Factual Background

The undisputed facts and inferences therefrom, taken in the light most favorable to the plaintiff follow. ActionAIDS is a nonprofit Pennsylvania corporation providing education, support group, and outreach services to people affected by HIV/AIDS. (Compl. ¶ 5.) Prison Health Services ("PHS") is a private entity with a contractual relationship with the City to provide general medical care to inmates in Philadelphia County prisons.² (Id. ¶ 9.) ActionAIDS performs its services pursuant to a contract with the City of Philadelphia's AIDS Activities Coordinating Office ("AACO"). (Id. ¶ 4.) ActionAIDS, through the testimony of Kevin Burns, Director of Patient Services for ActionAIDS, presented evidence that ActionAIDS and PHS have no contractual relationship between them. (Mr. Burn's Testimony, Hearing Tr.) [hereinafter "Hearing Tr."] Plaintiff has not rebutted this testimony.

ActionAIDS also presented un rebutted evidence that it has a four million dollar budget

² While plaintiff alleges in his complaint and in the briefing of the motion to dismiss that PHS is a state actor, he has offered no basis at all for this assertion. While a plaintiff deserves the benefit of all reasonable inferences on a motion to dismiss, this court does not credit "bald assertions." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997). Thus, plaintiff has not sufficiently alleged that PHS is a state actor to warrant that inference.

and receives funding from a number of sources. ActionAIDS receives approximately fifty percent (50%) of its funds through a contract it has with the City's AACO office. Another ten percent (10 %) of its funding comes from other public sources. Forty percent (40%) of its funding comes from private foundations and charitable grants. (Hearing Tr.)

ActionAIDS also presented un rebutted evidence that no representative from the City, Commonwealth, or PHS was involved in the formation, development, or day-to-day management of ActionAIDS. There is no seat on ActionAIDS' board of directors reserved for a representative from any of these entities. (Hearing Tr.)

ActionAIDS also presented testimony that the City does an annual review of ActionAIDS in terms of its performance of the AACO contract. A committee, including one or two members of AACO, randomly evaluates charts from ActionAIDS' records. A program analyst from the City meets with a supervisor at ActionAIDS to discuss goals, program design, and other issues pertaining to the services provided by ActionAIDS. Neither the review committee nor the program analyst has any involvement with ActionAIDS' oversight or discipline of its employees. (Hearing Tr.) This testimony was un rebutted.

ActionAIDS hired Mr. Graham on March 30, 1999 as a case manager to work with inmates affected by or at risk for contracting HIV/AIDS in the Philadelphia County prison system. (Compl. ¶ 17.) His duties as a case manager included providing education and supportive counseling to inmates affected by or at risk for contracting HIV/AIDS and assisting former inmates suffering from HIV/AIDS to find housing and social services upon leaving prison. (Pl.'s Aff. ¶ 3, Ex. A ¶¶ 3, 4, 9, 12.)

Several months before his separation from ActionAIDS' employment, Mr. Graham

testified at a bail reduction hearing on behalf of an inmate infected with HIV/AIDS. There, he opined that the inmate and other HIV/AIDS infected inmates did not receive proper medical care by PHS in the Philadelphia prisons. (Compl. ¶ 19.) His authority and competency, if any, to have testified about the contract performance of PHS is not established on the record.

On or about June 25, 2000, Mr. Graham participated in a panel discussion on inmates with HIV/AIDS and elaborated on the deficient level of care he felt that inmates with HIV/AIDS were receiving from PHS in the Philadelphia prison system. (Id. ¶ 20.)

Mr. Graham alleges that Harold Orr, Director of PHS in Philadelphia and Rodney Fry, Regional Director of PHS, met with defendants Beth Hagan, Supervisor for ActionAIDS, Jean Curran, Associate Director for ActionAIDS, and Kevin Burns, Director of Patient Services for ActionAIDS. Allegedly, the directors of PHS complained to the directors of ActionAIDS that plaintiff's statements at the bail hearing and in the panel discussion jeopardized contract negotiations in which PHS was involved with other prison systems. (Id. ¶ 21.) The defendant directors from ActionAIDS and the PHS directors allegedly agreed to sanction plaintiff for having disclosed that the services provided by PHS in the Philadelphia prisons were substandard. (Id. ¶ 22.)

Defendant directors for ActionAIDS met with plaintiff. Allegedly, defendant Curran told plaintiff that he had created an adversarial relationship with ActionAIDS' client, PHS. (Id. ¶¶ 26, 27.) Plaintiff claims that PHS demanded plaintiff's termination and threatened to terminate its relationship with ActionAIDS unless ActionAIDS terminated plaintiff. (Id. ¶ 27.) However, as to this motion plaintiff has not rebutted the testimony of Kevin Burns that there was no client or contractual relationship between ActionAIDS and PHS.

Plaintiff received a negative work performance on July 10, 2000, allegedly in furtherance of the agreement between the defendant directors from ActionAIDS and the directors from PHS. (Id. ¶ 23.) Plaintiff continued to receive poor performance evaluations and eventually was fired on July 26, 2000. (Id. ¶¶ 24-26.)

III. Discussion

A. *Legal Standard for Summary Judgment*

Upon a motion to dismiss filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, if matters outside the pleading are presented to, and not excluded by the court, the motion must be treated as one for summary judgment, and all parties must be given a reasonable opportunity to present all material made pertinent to such a motion. Here, the parties were informed by court order that testimony would be taken as well as argument heard on defendant's motion to dismiss at the hearing set for June 19, 2002.

Rule 56 of the Federal Rules of Civil Procedure provides that a court must grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). To survive defendant's motion for summary judgment, a plaintiff must establish that there is a genuine issue of material fact by coming forward with "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment should be directed "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will

properly preclude the entry of summary judgment.” Andersen v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

B. Claim under 42 U.S.C. § 1983

1. State Action Requirement

Section 1983 provides a cause of action against any “person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . .” 42 U.S.C. § 1983. The threshold requirement for bringing such a claim is “that the alleged deprivation was committed by a person acting under color of state law.” Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995) (quoting Moore v. Tartler, 986 F.2d 682, 685 (3d Cir. 1993)). “The ‘under color of law’ requirement for § 1983 liability is identical to the ‘state action’ requirement under the Fourteenth Amendment.” Id. (quoting United States v. Price, 383 U.S. 787, 794 n.7 (1966)). Thus, the issue before this court is whether the private entity, ActionAIDS, was a state actor at the time of the alleged constitutional violations, that is, at the time that it terminated Mr. Graham.

2. Tests for State Action

In general, state action may be found only when there is such a “close nexus between the State and challenged action” that private behavior “may be fairly treated as that of the State itself.” Brentwood Acad. v. Tennessee Secondary Sch., 531 U.S. 288, 295 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)). Further, even if an entity is found to be a state actor for a specific public function it performs, the relevant analysis is whether

the entity is performing that particular function at the time the action that allegedly causes the constitutional violation occurs. See George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996) (noting that an entity may be a state actor for some purposes but not for others).

The third circuit has used three discrete tests derived from various Supreme Court decisions to determine whether a private parties' actions constitute state action: (1) state compulsion; (2) joint participation; and (3) exclusive public function. See Mark, 51 F.3d at 1142. A host of factors bear upon whether there is state action and the state action inquiry is fact dependent. See Robert S. v. Stetson School, Inc., 256 F.3d 159, 165 (3d Cir. 2001) (citing Brentwood Acad., 531 U.S. at 296).

a. State Compulsion

Mr. Graham alleges that employees of PHS met with employees of ActionAIDS and threatened to terminate their relationship with ActionAIDS unless ActionAIDS fired him for comments he made regarding substandard health care services provided by PHS to prisoners with HIV/AIDS in the Philadelphia prison system. Under the state compulsion test, state action can be found when "the private party has acted with the help of or in concert with state officials" to cause a violation of one's constitutional rights. Mark, 51 F.3d at 1142 (quoting Mckesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 524 (3d. Cir. 1994).

ActionAIDS fails the state compulsion test for two reasons. It is undisputed that PHS is a private entity with a contractual relationship with the City of Philadelphia and it is not an agency of the City. Even assuming that in its performance of services pursuant to the City contract PHS is a state actor, it does not follow that PHS is a state actor for any other purpose. As discussed supra,

the relevant analysis is not only whether PHS is a state actor but whether it was a state actor for the purposes of the alleged constitutional violation. See George, 91 F.3d at 1230. Even if one assumes that PHS is a state actor for the purpose of providing health care to prison inmates, it was not a state actor when, to protect its own business interests, PHS allegedly asked ActionAIDS to fire one of its employees who was being critical of PHS. No genuine issue of material fact exists as to whether ActionAIDS is a state actor under the state compulsion test. It is not.

b. Joint Participation

Under the joint participation test, state action can be found only when the state has so insinuated itself with the private actor that it must be recognized as a joint participant in the offending actions. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In a factually similar case to the instant one, Boyd v. Southern Home Services, No. CIV.A., 94-3019, 1996 WL 263413 (E.D. Pa. May 17, 1996), the court found that a private organization who fired one of its employees was not a state actor for § 1983 purposes. Id., at *1. The defendant, Southern Home Services, was a private, non-profit, tax-exempt organization with a private board of directors, formed to provide services to poor children. Id. Southern Home was largely funded by the Philadelphia Department of Human Services (DHS) and, pursuant to its contract with DHS, agreed to comply with its performance standards, its Operation Manual, and with its program bulletins and policy transmittals. Id. at *1-2. DHS, however, had no direct influence on Southern Home's hiring and firing procedures. Id. at *2. Based on these factors, the court found "no . . . indicia of a . . . state-private entity relationship" under the joint participation test. Id. at

*3.

Similarly, the un rebutted record evidence is that ActionAIDS is a private, non-profit social service agency. According to the testimony of Kevin Burns, Director of Client Services for ActionAids, no one from the City, State, or PHS was involved in the formation, development, or day-to-day management of ActionAids, and there was no board seat reserved for a City representative or a member of PHS. Mr. Burns further testified that no one from the City or PHS was or is involved in any way in the hiring, firing, or evaluation of its employees.

The City does an annual review through a committee, consisting of one or two members of AACO. It randomly pulls charts from ActionAIDS' records to monitor progress on the City contract. In addition, a program analyst is assigned from the City to meet with Beth Hagan, a supervisor for ActionAIDS, to discuss ActionAIDS' goals, program design, and other issues pertaining to the services it provides. Mr. Burns testified that the annual chart reviews and Ms. Hagan's discussions with a program analyst in no way relate to ActionAIDS' oversight or discipline of its employees.

In Burton, 365 U.S. at 724, the leading joint participation case, the Supreme Court focused on the fact that the state benefitted from the constitutional violation in finding state action by the private actor. Here, there is no allegation that the City in any way benefitted from the firing of the plaintiff. Therefore, the court finds that there is no genuine issue of material fact as to whether ActionAIDS is a state actor under the joint participation test. It is not.

c. Exclusive Public Function

Under the public function test, state action can be found only when "the private entity has exercised powers that are traditionally the exclusive prerogative of the state." Mark, 51 F.3d at

1142 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982)). “[W]hile many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the state.’” Roberst S., 256 F.3d at 165-66 (quoting Flagg Brothers Inc. v. Lefkowitz, 436 U.S. 149, 158 (1978)). Accordingly, courts have increasingly recognized the rigorous standard of this test and have rarely found that it is met. Mark, 51 F.3d at 1142. In Rendell-Baker v. Kohn, the court held that state funding for a private school for troubled high school students did not serve the exclusive prerogative of the state. 457 U.S. 830, 842 (1982); see also Black v. Indiana Area Sch. Dist., 985 F.2d 707, 710-11 (3d Cir. 1993) (state funding of a private contractor providing state school bus program was not performing the exclusive prerogative of the state); Jackson, 419 U.S. at 353 (the furnishing of utility services is not an exclusive prerogative of the state). Rare examples of traditional public functions include holding elections and exercising eminent domain. See Ellison v. Garbarino, 48 F.3d 192, 195 (6th Cir. 1995).

ActionAIDS presented evidence that its services have not been traditionally exclusive functions of the state. Mr. Burns testified that such services are almost always performed by churches and other non-profit charitable organizations. This testimony was unrebutted. In addition, even assuming that providing education, support group, and outreach services to inmates with HIV/AIDS has been a function exclusively performed by the state, controlling the management of ActionAIDS’ workforce is certainly not an exclusive public function. Therefore, the court finds that there is no genuine issue of material fact as to whether ActionAIDS is a state actor under the public function test. It is not.

In Brentwood Academy, the Court noted that no one factor is a necessary condition for finding state action and no one factor requires a finding of state action and discussed the various

factors that the Court has used to determine whether it is fair to attribute state action to a private actor. 531 U.S. at 295-96. In addition to state compulsion, joint participation, and exclusive public function, the Court noted that state action has been found when a private entity is controlled by an “agency of the State” or when it is “entwined with governmental policies” or when it is “entwined in [its] management or control.” Brentwood Acad., 531 U.S. at 296. (citations omitted). Conversely, in Rendell-Baker, the Court found that neither substantial reliance on state funds nor extensive state regulation that did not compel the challenged conduct is sufficient to convert the actions of a private actor to state action. 457 U.S. at 840-41.

Here, there is no allegation that ActionAIDS is controlled by an agency of the state or that ActionAIDS is entwined in governmental policies. As discussed supra, the unrebutted record evidence shows that no one from the City or State was involved in ActionAIDS’ formation, development, or day-to-day management. No public employee sits on the Board of Directors for ActionAIDS. Furthermore, no one from the City was involved in any manner in the hiring, firing, or evaluation of ActionAIDS’ employees.

Applying the Rendell-Baker factors, the record shows that ActionAIDS receives about 50% of its funds through a contract it has with the City’s AACO office, far less than the 90% funding which was received from the school at issue in Rendell-Baker. Further, the City does not regulate ActionAIDS’ corporate business. The City performs oversight of its contract with ActionAIDS by pulling random charts to monitor progress and meeting with a supervisor to discuss issues pertaining to the services provided by ActionAIDS. There is no allegation that any City regulation involved the oversight or discipline of ActionAIDS’ employees, much less that a City regulation compelled Mr. Graham’s discharge. There is no genuine issue of material fact as

to whether AcitionAIDS is a state actor under any of these factors. It is not.

C. State Law Claims

The court declines to retain jurisdiction over the state law claims since the federal claims over which this court has original jurisdiction have been dismissed. 28 U.S.C. § 1367(c)(3). In this case, underlying issues which are necessary to the determination of the free speech claim under the Pennsylvania Constitution and the wrongful discharge claim implicate difficult and unsettled issues of state law and important public policy considerations which should be decided by the Pennsylvania state courts. See Curran v. Southeastern Pennsylvania Trans. Authority, 1999 WL 79504, at *4 (E.D. Pa. January 21, 1999) (finding that whether a private cause of action exists under Article I, Section 7 of the Pennsylvania Constitution is a difficult and unsettled issue of state law); Clay v. Advanced Computer Applications, 559 A.2d 917, 198 (Pa. 1989) (finding that the only exception to the employment at-will doctrine is whether the discharge violates clear mandates of public policy).

Further, Mr. Graham will not be prejudiced by this court declining to retain jurisdiction over his state law claims since he is not time-barred from bringing either claim in state court. As to the free speech claim, because “Pennsylvania has no statute of limitations of general applicability to actions involving violations of constitutional rights, the applicable statute of limitations must be determined from the conduct alleged in the complaint.” Harris v. Comm. of Pennsylvania, 419 F. Supp. 10, 14 (D.C. Pa. 1976). Since section 1983 claims vindicate personal rights secured by the constitution, the same two-year statute of limitations that governs section 1983 actions, also governs claims brought directly under the Pennsylvania Constitution. See

Wilson v. Garcia, 471 U.S. 261, 279-280 (1985) (§ 1983 claims are best characterized as personal injury actions and should be governed by the state statute of limitations applicable to personal injuries) and 42 PA. CONS. STAT. § 5524 (two-year statute of limitations for injuries to a person). Plaintiff's count in wrongful discharge is a tort action also with a two-year statute of limitations under 42 PA. CONS. STAT. § 5524. See Gates v. Servicemaster Commercial Serv., 631 A.2d 677, 79 (Pa. Super. 1993).

Mr. Graham was terminated on approximately July 26, 2000. (Graham Aff. ¶ 10.) Because the federal supplemental jurisdiction statute tolls the two-year statutes of limitations for the pendency of the federal action plus thirty days, he is not prejudiced by having these claims dismissed without prejudice to their being timely brought in a proper state forum. 28 U.S.C. § 1367(d).

IV. Conclusion

For the above-stated reasons, the 42 U.S.C. § 1983 claim against ActionAIDS and its named individual employees is dismissed with prejudice. This court declines to retain jurisdiction over the state law claims. Accordingly, they are dismissed without prejudice to plaintiff timely filing them in a proper state forum. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES P. GRAHAM,	:	CIVIL ACTION
Plaintiff,	:	NO. 01-2593
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, <u>et al.</u> ,	:	
Defendants	:	

ORDER

AND NOW, this ____ day of July, 2002, upon consideration of the "Motion to Dismiss By Defendants ActionAIDS, Kevin Burns, Elizabeth Hagan, and Joan Curran," Docket #16, the responses thereto, and the testimony given at a hearing on June 19, 2002, it is hereby ORDERED that the motion is GRANTED. Counts III is DISMISSED WITH PREJUDICE. Counts V and VI are DISMISSED WITHOUT PREJUDICE to their being timely brought in a proper state forum.

Inasmuch as plaintiff withdrew all of his claims against the City during the oral argument on this motion, plaintiff's claims against the City are DISMISSED WITH PREJUDICE.

BY THE COURT:

JAMES T. GILES C.J.

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